Filed 5/10/10 In re J.J. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE J.J., a Person Coming Under the Juvenile Court Law.	H034470 (Monterey County Super. Ct. No. J43662)
THE PEOPLE, Plaintiff and Respondent, v. J.J., Defendant and Appellant.	

The minor J.J. appeals from a juvenile court disposition order committing him to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), following his admission of having committed assault with a deadly weapon causing great bodily injury in association with a criminal street gang. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a), 186.22, subd. (b)(1).) He contends that the court abused its discretion in committing him to DJJ, because its decision was based upon an incomplete and erroneous understanding of his case. For reasons we will explain, we will reverse the

dispositional order committing the minor to DJJ and remand the matter for a new disposition hearing.

BACKGROUND

On September 5, 2008, the minor admitted to a Salinas police officer that he possessed a knife on school grounds. The minor was cited and released to the school. On October 23, 2008, the minor intentionally hit a 15-year-old boy with a vehicle and then drove off. On November 9, 2008, Salinas police officers observed a white Honda back into another motor vehicle and then drive off. The officers initiated a traffic stop of the Honda. The minor was the driver of the vehicle and he informed the officers that the vehicle was stolen. The vehicle's stereo had been removed from the center console and was found on the rear seat of the vehicle. The minor was arrested and searched. In his front pocket officers found a shaved key. The minor's cell phone contained Sureño gang pictures and rap music. The minor was taken to juvenile hall and the Honda's passengers were released to their parents.

The district attorney filed a petition under Welfare and Institutions Code section 602[1] on November 12, 2008, alleging that the minor, then age 15, committed felony possession of a knife on school grounds (Pen. Code, § 626.10, subd. (a); count 1), felony vehicle theft (Veh. Code, § 10851, subd. (a); count 2), felony vandalism (Pen. Code, § 594, subd. (a); count 3), misdemeanor hit and run (Veh. Code, § 20002, subd. (a); count 4), and misdemeanor possession of burglary tools (Pen. Code, § 466; count 5).[2] At a hearing on November 18, 2008, the minor admitted the allegations in counts 1 and 2, and agreed that the remainder of the counts could be considered true for purposes of

[1] Further unspecified statutory references are to the Welfare and Institutions Code.

[2] None of the allegations referred to the October 23, 2008 incident.

disposition. At the disposition hearing on December 5, 2008, the court declared the minor to be a ward of the court and placed him on probation for 24 months with various terms and conditions, including gang terms and conditions.

On January 16, 2009, the probation department filed a notice under section 777 alleging that the minor had violated probation by being out of his home after 8:00 p.m. without prior approval of his probation officer, associating with a gang member, and being a passenger in a stolen vehicle, all on January 14, 2009. At a hearing on January 20, 2009, the minor admitted the allegations in the notice. The court continued the minor on probation and ordered him to serve 60 days in juvenile hall.

On April 7, 2009, the probation department filed a new notice under section 777 alleging that the minor's cell phone and iPod were found on April 3, 2009, to contain gang indicia. At a hearing on April 8, 2009, the minor admitted the allegations in the notice. The court terminated the minor from the Rancho Cielo program, ordered that he not be returned to the program, and continued the matter for disposition. On April 22, 2009, the court continued the minor as a ward of the court and ordered that he serve 45 days in juvenile hall.

In the meantime, on April 10, 2009, Salinas police officers contacted the minor at Juvenile Hall and took him to the police department in order to question him about the murder of a minor, I.M., that had occurred on March 30, 2009.[3] During the interview, the minor told the officers that he had been in a white vehicle on October 23, 2008, with two friends when he saw 15-year-old I.M. One of the minor's friends identified I.M. as a Norteño gang member. The minor decided to ask I.M. where he was from. I.M. did not respond to the minor, but he displayed four fingers. The minor, who admitted during the interview that he is a Sureño gang member, became angry at I.M.'s display. The minor

[3] The officers had obtained an ex parte order from the presiding judge of the juvenile court allowing the police conduct.

switched seats with the driver of the vehicle and hit I.M. with the vehicle. The minor then panicked and drove off. Officers had previously learned that I.M. lost consciousness as a result of the hit and run and woke up in the hospital. He reported to the police that he lost four of his top teeth and his bottom teeth had been moved slightly to the rear as a result of the incident.

On April 14, 2009, the district attorney filed an amended section 602 petition alleging that the minor committed attempted murder (Pen. Code, §§ 664, 187, subd. (a); count 1), assault with a deadly weapon, a vehicle (Pen. Code, § 245, subd. (a)(1); count 2), and hit and run causing injury (Veh. Code, § 20001, subd. (a); count 3), all on October 23, 2008. The petition further alleged that the minor personally inflicted great bodily injury during the commission of the offenses in counts 1 and 2 (Pen. Code, § 12022.7, subd. (a)), and that all three offenses were committed for the benefit of and in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). On May 26, 2009, the minor filed a motion to suppress the statement he made to the officers on April 10, 2009, contending that the officers had not obtained a knowing, intelligent and voluntary waiver of his section 625[4] and *Miranda* rights.[5] The district attorney filed opposition to the motion on June 1, 2009.

At the hearing on the motion on June 16, 2009, the court stated that it had read and considered the motion and the opposition, and had viewed the recording of the minor's

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[4] Section 625, subdivision (c) states in part: "In any case where a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor is a person described in Section 601 or 602, . . . the officer shall advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel."

[5] *Miranda v. Arizona* (1966) 384 U. S. 436.

police interview.[6] The parties submitted the matter without argument and the court denied the motion stating, "[T]he admonitions according to . . . *Miranda* were given clearly, and the minor indicated he understood them, and there was no indication of his right to remain silent, nor of any request for an attorney. [¶] They talked for a long period of time, a very animated conversation with the two officers involved, and what happened was not a violation of the Code or of the Constitution." The minor then entered into a negotiated disposition wherein he admitted the allegations in count 2 of the petition (Pen. Code, § 245, subd. (a)(1)), as well as the great bodily injury and gang enhancement allegations (Pen. Code, §§ 12022.7, subd. (a), 186.22, subd. (b)(1)) as to that count, and the district attorney dismissed counts 1 and 3. The court referred the matter to the probation department for a disposition report, and the minor waived his *Arbuckle* rights.[7]

The probation officer reported that the minor admitted his involvement in the incident at issue. The minor "admitted to being a Sureno gang member. He stated that he has affiliated with the Sureno gang for the last three [to] four years, and he is committed to the gang. According to Probation records, the minor has a history [of] associating with Sureno gang members and has a tattoo of the letter 'E' on his left calf, and the letter 'S' on his right calf. The tattoo stands for 'East Side.' " The probation officer reported that the murder of I.M. in March 2009 was unrelated to the minor's October 2008 conduct, that the minor had a prior sustained section 602 petition involving two felonies, and that the minor's October 2008 conduct occurred "prior to his involvement in any of the aforementioned sustained offenses." The probation officer also reported that, "[s]ince being adjudged a Ward of the Juvenile Court, the minor's conduct

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[6] The parties agree that the DVD was submitted to the juvenile court without a transcript, and no transcript of the DVD is in the record on appeal. The record does contain the DVD itself.

[7] *People v. Arbuckle* (1978) 22 Cal.3d 749.

on probation appears to have been unsatisfactory." The minor had two prior sustained section 777 matters involving gang-related conduct, including associating with gang members, his participation in the Silver Star Program at Rancho Cielo was terminated by the court as a result of his last probation violation, and on June 29, 2009, the minor received a juvenile hall incident report because he punched a window and cracked it when he learned that his girlfriend was going to leave him. The minor has school credits only equivalent to that of a freshman, and he admitted to experimenting with alcohol and marijuana.

The probation officer recommended that the minor be committed to the DJJ, and reported that "[d]uring his commitment, the minor will participate in a high school education program, gang awareness program, substance abuse program, anger management program, and an impact of crime on victims program." "[L]ess restrictive alternatives, such as placement in a group home or the Monterey County Probation Department Youth Center, have been considered and deemed inappropriate." "[A] commitment less than the [DJJ] is inappropriate, as the offense is violent, and serious. Furthermore, the offense was committed for the direct cause or benefit of the Sureno criminal street gang. Less restrictive alternatives place the community at great risk." "The minor displays a high level of delinquent sophistication, unsuitable for the above-mentioned alternatives." "For the safety and protection of the community, . . . commitment to the [DJJ] is appropriate and necessary."

At the disposition hearing on July 15, 2009, the minor's counsel asked the court "to seriously consider something other than" DJJ. "I feel that the conduct that's reflected in this incident, which occurred back in October, is both out of character and unusual for" the minor. "Obviously, there is one incident where he lost his temper and broke the window in the hall. But given the importance of personal relationships to adolescents and the difficulty of expressing upset and despair, that seems to me to be a more reasonable response than turning any kind of disappointment or unhappiness outward and

making themselves test [*sic*] among the staff or the youngsters in the hall." "I do not think [the conduct the minor admits] is a considered action at all. I think it was a matter of impulse and losing one's temper." "I just don't think that DJJ has anything to offer" the minor. "[H]e can do a year in the youth center, and that . . . would be a substantial amount of time for him to benefit from everything the youth center has to offer and not be exposed, I think, to the real rather grizzly situation that exists in the youth authority at this point."

The prosecutor stated that, "unlike the Court and counsel, I have had the opportunity to see the taped confession of [the minor] in this case. And it was striking to me, and is what makes my recommendation difficult." The prosecutor noted that the minor wept when he spoke to the officers and "actually reached out to them for help" during his confession, yet the police report and probation report stated that the minor "actually remov[ed] someone from the front seat of the vehicle so that he could drive that car and run over someone that he doesn't even know." "I would submit to the Court that I see two sides in [the minor] and I can't reconcile. So submit it to the Court."

In deciding to commit the minor to DJJ for the maximum period of confinement of 12 years, the court stated in part: "I look at his background and see that in November '08 when he came . . . to us for possession of a knife on school grounds and also vehicle theft[, w]e tried to intervene with the gang intervention program – California Youth Outreach – and he was declared a ward at that time.

"Two months later, he is back on another violation, associating with gang members and being a passenger of a stolen vehicle. Three months after that, they throw him out of Rancho Cielo for possession of gang paraphernalia.

"Six months after that comes this event where he drives a motor vehicle and specifically hits somebody with that motor vehicle.

"[Eleven] months from our first intervention, we tried gang intervention with him, we have tried keeping him busy with Rancho Cielo and all the services that are available

there, but he continues to go down further and further. It is unfortunate, but when you look at this background and then you look at where he is today, whether he cried or not, he intended to do what he did the way he did it.

"He . . . had – at the time of the event when he was asking somebody to 'pull over and let me drive,' the opportunity to disengage from the conduct that he was about to do and reflect upon the act of wanting to harm somebody for flashing a weapon [*sic*].

"This crime involved great violence to somebody else and a high degree of callousness by just running down somebody in a car. He, by taking possession of the vehicle from somebody else, occupied a position of leadership over everyone else in that car and dominated them by taking him along because he ran down somebody.

"The event itself carried out indicated planning. While you may think that it may be impulse, he had time to stop and think and disengage, and when he said 'switch seats with me,' and began to drive, that showed exactly what his intention was, that he could have disengaged from, refused to disengage from.

"He was too angry to disengage, but he planned to run that person over. He said, 'I was just going to scare him.' That is why he drove upon onto the sidewalk.

"Additionally, when you look at this event, he is engaged in violent conduct that indicates that he is a serious danger to society. His prior sustained petitions are increasing seriousness, so serious, he almost killed somebody this time. He is going from a knife to stealing vehicles to gang activity and now gang activity with a vehicle as a deadly weapon.

"Additionally that, he was on probation at the time he committed this event. And his prior performance clearly on probation was unsatisfactory previous to this and now this event."

"His behavior places the community at significant risk and cannot be tolerated.

"Less restrictive alternatives such as placement in a group home have been considered and are deemed inappropriate based on all the factors that I just said.

"For the safety and protection of the community, I believe [DJJ] is appropriate and necessary in this event."

"I believe [DJJ] has programs that will probably benefit this minor."

"Less restrictive alternative has proven to be ineffective and inappropriate. It is in the best interest that this minor requires the [DJJ] commitment."

DISCUSSION

On appeal, the minor contends that the juvenile court abused its discretion by committing him to DJJ. "First, the court misunderstood the timeline . . . [and] failed to recognize the fact that the conduct which formed the instant offense took place before any of the prior petitions." "By mistaking the proper timeline, the court failed to realize the progress [the minor] had actually made. The court's erroneous belief that this offense took place eleven months after [the minor] was placed on probation led the court to believe that gang education and the Rancho Cielo program were not working, and that [the minor] continued to commit violent offenses. The intervention was working. Although [the minor] had twice violated his probation, the violations were of a non-violent nature. By not reviewing the recorded confession, the court failed to realize the full impact on [the minor] of being accused of a gang-related murder. [The minor] came fact-to-face with the realities of gang life during that interview, and did not like what he saw. Had the court properly understood [the minor's] situation, the court would have realized that less restrictive alternatives were having a positive impact, and that [the minor's] behavior was substantially improved."

The Attorney General contends that "there is no merit to [the minor's] assertion that the juvenile court 'misunderstood the timeline.' " The Attorney General argues that the information about the minor's "commitment to the Sureno lifestyle and his callous recollection of his role in this incident" "was obtained in July 2009, after [the minor] had been adjudged a ward, had repeatedly violated the terms of his probation for over a year, and had been expelled from a special program at Rancho Cielo," and "[t]he probation

report advised the court that the current offense on October 23, 2008 occurred 'prior to his involvement in any of the aforementioned sustained offenses.' " "The juvenile court correctly considered [the minor's] entire delinquent history in concluding that his escalating criminal conduct argued in favor of DJJ." The Attorney General further argues that "[t]here is no merit to [the minor's] claim, . . . that the juvenile court 'failed to review and take into account [the minor's] recorded confession.' " "[D]efense counsel never asked the juvenile court to view the DVD prior to or at the dispositional hearing. In fact, counsel never mentioned it at the hearing. The claim is waived."

The appellate court reviews a juvenile court's decision to commit a minor to DJJ for abuse of discretion. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151.) Absent a clear showing of abuse, the exercise of the juvenile court's discretion will not be disturbed on appeal. An appellate court will not lightly substitute its judgment for that of the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. (*In re Tyrone O.*, *supra*, at p. 151; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.)

The record must demonstrate both a probable benefit to the minor and the inappropriate or ineffectiveness of less restrictive alternatives. (*In re Angela M.*, *supra*, 111 Cal.App.4th at p. 1396; *In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556.) A reviewing court must examine the evidence at the disposition hearing in light of the purposes of the juvenile court law. (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) The juvenile court focuses on (1) the protection and safety of the public, and (2) rehabilitation of the minor through care, treatment and guidance which is consistent with the minor's best interest, holds him accountable for his behavior, and is appropriate for the circumstances. This may include punishment that is consistent with rehabilitative purposes and a restrictive commitment as

a means of protecting the public safety. (§ 202, subds. (a), (b) & (d); *In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684; *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

We agree with the minor that, in this case, the record indicates that the juvenile court may not have understood that the offense for which the minor was before the court for disposition had occurred prior to the minor's conduct underlying his previously sustained section 602 petition and section 777 probation violation notices. The court found that the conduct had occurred "six months after" the minor was terminated from the Rancho Cielo program for possession of gang paraphernalia, and "[eleven] months from our first intervention." The court also found that the minor "is going from a knife to stealing vehicles to gang activity and now gang activity with a vehicle as a deadly weapon," and that "he was on probation at the time he committed this event."

Contrary to the court's findings, the conduct at issue before the court occurred about six months before the minor was terminated from the Rancho Cielo program for possession of gang paraphernalia and just a few weeks before the first section 602 petition was filed. The conduct occurred after the minor possessed a knife on school grounds but before he committed the vehicle theft and the misdemeanor hit and run, all of which constituted the conduct underlying the minor's first section 602 petition. The minor's most serious conduct after the juvenile court intervention involved being a passenger in a stolen vehicle and breaking a window at the juvenile hall, although he also continued his association with gang members and continued to possess gang indicia.

"Although variously phrased in various decisions [citation], [the standard of review for abuse of discretion] asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) A discretionary disposition decision rendered by a judge who did not have an accurate understanding of the minor's juvenile court history would not be sustainable as a proper exercise of discretion. (Cf. *In re Large* (2007) 41 Cal.4th 538, 550.) Thus, when the record affirmatively discloses that the

juvenile court exercised its discretion based on a misunderstanding of the relevant facts, remand to the court is required to permit the court to exercise its discretion with full awareness of the accurate information about the minor's juvenile court history. (See *In re Ronnie P*. (1992) 10 Cal.App.4th 1079, 1091; see also *People v. Deloza* (1998) 18 Cal.4th 585, 600.)

Here, the record shows that the juvenile court judge who made the disposition determination was not the same judge who ruled on the motion to suppress evidence and who accepted the minor's admission of the assault charges. The record also discloses that the juvenile court judge presiding at the disposition hearing exercised its discretion based on a misunderstanding of the chronology of the relevant facts. In addition, we observe that the prosecutor, who had viewed the DVD of the minor's police interview where he admitted the conduct at issue before the court, did not argue at the disposition hearing for a commitment to DJJ. Accordingly, we will remand the matter to permit the court to exercise its discretion to order an appropriate disposition based on an accurate understanding of the chronology of the minor's juvenile court record. On remand, either party may request that the court review the DVD of the minor's police interview prior to the new disposition hearing.

DISPOSITION

The disposition order of July 15, 2009 is reversed, and the matter is remanded for a new disposition hearing.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.